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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 293

ARMOUR AND COMPANY, A CORPORATION,
Petitioner,

against

THE ALTON RAILROAD COMPANY, A CORPORATION, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Chicago, Illinois.

Chicago, Illinois, August 1st, 1940.

THE GUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petition.

The petitioner, Armour and Company, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit (hereinafter styled the Circuit Court) entered in the above cause (on original appeal) on April 4, 1940, and (on petition for rehearing) on May 21, 1940.

The opinions of the courts below; the statutes involved;

and the specific errors complained of, are fully set forth in the brief contemporaneously filed in support of this petition.

Summary Statement of the Matter Involved.

This case involves the question of the original jurisdiction of the District Courts of the United States under Section 9 and 22, (and incidentally of the State Courts, under 22) of the Act to Regulate Commerce (Sec. 9 and 22, Title 49, U. S. C. A.), (hereinafter referred to as the Commerce Act), to hear and decide, without prior consideration of the question by the Commerce Commission, an action brought against a common carrier by railroad in interstate commerce, for damage arising from carriers' wrongful delivery of Plaintiff's property at destination, to a third person not entitled to receive it as Plaintiff's agent, and not a party to any transportation contract with the Plaintiff, before any tender of delivery thereof had been made to Plaintiff. Incidental to the consideration of this basic jurisdictional question, are related questions, involving the substantive Federal law of common carriers, hereafter referred to.

No evidential controversy is presented. The case is here solely on Defendant's motion to dismiss for lack of jurisdiction: The facts set forth in the complaint are, for the purposes of the motion, taken as admitted and true (*Kansas* v. *Colorado*, 185 U. S. 125), (*Louisville & N. R. Co.* v. *Mottley*, 211 U. S. 149, at 152, and cases there cited). (*Leimer* v. *State Mut. Life Assurance Co.*, 108 Fed. (2d) 302, at 305, and cases there cited.)

Those facts are summarized, with record references, as follows:

> Defendants are common carriers by railroad. (R. 5.) They hold themselves out to transport livestock to a station named in their tariffs as "Union Stock Yards,

Illinois" (R. 7), *at which station* (but *not* constituting it) they maintain a common depot (R. 7) at a public stock yard not owned by them. (R. 6.)

Plaintiff, after May 25, 1933, purchased many cars of livestock, and contracted with Defendants severally, for the transportation thereof, and for delivery to Plaintiff at the tariff station, "Union Stock Yards, Illinois" (R. 9) (*not* at the public stock yards). Plaintiff fully performed its contract (R. 9) but, before Defendants had tendered any delivery thereof to Plaintiff, or completed the transportation of such shipments, Defendants placed the shipments in the possession of the Stock Yards Company. (R. 9, 10.) After unloading them, before any attempt at direction or control by the Plaintiff, the Stock Yards Company notified the Plaintiff of the location of its property. (R. 10.)

Before any of the shipments had arrived at the destination station, or been placed in the possession of the public stock yards, Plaintiff had notified each Defendant, that it desired a delivery of such shipments through carriers' *own* pens, *either* at the public stock yards, "*or at such other point at which delivery was tendered,*"* but would, after May 25, 1933, pay no charges above the tariff transportation rate for mere delivery. (R. 11 and 32, 33.) The public yards then notified Plaintiff that it would levy an extra charge upon any of Plaintiff's property placed in the public stock yards by the carriers. (R. 11.)

Plaintiff passed this information on to the carriers, and notified them that the public stock yards had no authority, after May 25, 1933 (R. 12) to accept or receipt for, or handle, Plaintiff's livestock as its agent, or for its account (and that Plaintiff desired to use no service or facilities of the Yards Company such as had

* In this connection the decision of this Court in *Covington Stock Yards* v. *Keith*, 139 U. S. 128, should be noted. At page 136, this Court held that the carrier had the absolute right to select a point within the limits of the destination station, as the delivering point for livestock shipments; that it might even select and hire a public stock yards, and if such delivery were offered to consignee without the imposition of extra charges, consignee would have no cause of complaint. Accordingly, the Plaintiff here had no legal right to do more than name the tariff station at which delivery should be made; and this action is not for damages arising *per se* from Defendants' employment of the public stock yards as their delivering agent, but for damages arising from Defendants' failure to pay the agent they had hired.

been used by Plaintiff prior to May 25, 1933). (R. 10, 11.) Plaintiff repeated its notice that it would accept this livestock either at the public stock yards "or at any other point where tender thereof was made," and notified Defendants that any delivery of its property by Defendants to the Stock Yards Company, would constitute a conversion of its property (excepting a delivery for a free redelivery to Plaintiff). (R. 12, 36-38.)

Defendants well knew the foregoing facts, and knew that if they delivered Plaintiff's property to the Yards Company, Plaintiff would never receive it until Plaintiff had paid the extra charges demanded by such Yards Company. (R. 13.) Notwithstanding this knowledge Defendants failed:

(1) to provide, by lease or otherwise, any depot pens or facilities any place at their said station, either at the public stock yards or elsewhere, through or over which Plaintiff might receive a free delivery of its property. (R. 20.)

(2) to make any arrangement with carriers' agent, the Yards Company, under which Plaintiff might have free ingress to, and egress to a public street from, the point at which delivery of Plaintiff's property was first tendered to it. (R. 13, 14.)

As to each contract of shipment made after May 25, 1933, Defendants continued to place Plaintiff's property in the possession of the Stock Yards Company, before any tender of delivery to Plaintiff, but refused to pay the Stock Yards Company any of the charges demanded by it for the services and facilities rendered and furnished to the said carriers for such property. As a result no opportunity was ever afforded the Plaintiff, by the Defendants, to take possession of its property at any point at destination, without the payment to a third person, not a party to the transportation contract, and not the agent or employee of Plaintiff, and not a common carrier employed by Plaintiff, of a sum of money over and above the transportation rate, which sum Plaintiff had never contracted or agreed to pay, for a service which Plaintiff had never demanded or engaged. (R. 17.) Plaintiff paid the charges of carriers' employee under protest, for carriers' account, demanded repayment thereof from Defendants, and

upon their refusal to reimburse Plaintiff (R. 17), it brought this suit.

1. *The new factual situation and contractual status presented.*

The case thus presents a factual situation, and a contractual status as to deliveries of livestock at the Chicago Public Stock Yards, *differing from any prior case* considered by this Court involving deliveries at those yards, in this respect: Here, the consignee made *no selection* of any specific point within the limits of the destination station, at which delivery should be made, but left that selection to the carrier,* with the proviso that the carriers *should not* select the said public stock yards, located within those station limits, as the delivery point, *unless* they assumed the added costs resulting from such selection. In former cases, the Chicago Public Stock Yards was specifically named *by the consignee* or shipper as the point of delivery. (See *Atchison, Topeka & S. F. Ry.* v. *U. S.*, 295 U. S. 193 at 195) or delivery at such yards was tacitly agreed to (see *Adams* v. *Mills*, 286 U. S. 397).

2. *Proceedings in the Courts below.*

Many similar but separate causes of action against Defendants severally, arising on separate bills of lading, were joined in the original complaint herein, filed in the State Courts, such joinder of Defendants, and of causes of action, being authorized by the provisions of Section 148, Chapter 110 of Smith-Hurd Illinois Annotated Statutes. (Illinois Civil Practice Act, 1933, Section 24.) The complaint was filed in the Circuit Court of Cook County, Illinois, and removed to the United States District Court for the Northern District of Illinois, Eastern Division (hereinafter styled the District Court), on motion of

*See footnote, page 3, *supra*.

the carriers. (R. 38-40.) Carriers then moved to dismiss, on three grounds (R. 40-46), only the first of which is involved here, to wit: that the District Court was without jurisdiction of the cause for lack of prior consideration by the Interstate Commerce Commission.

The District Court sustained carriers' motion upon all three grounds. (R. 53-55.) Plaintiff appealed to the United States Circuit Court of Appeals for the Seventh Circuit (hereinafter styled Circuit Court), alleging error in all three respects. (R. 55-67.) The Circuit Court passed upon but one of the three questions appealed, and affirmed the lower court on the sole ground that Armour's action for damages for misdelivery lay within the exclusive jurisdiction of the Interstate Commerce Commission. (R. 77-86, 91-92.) On rehearing, after the Commerce Commission had passed upon a related question arising under Section 1 of the Act, on complaint of a different shipper, the Circuit Court affirmed its prior decision. (R. 91-92.)

The Basis for the Jurisdiction of This Court to Review the Judgment in Question.

1. The statutory provision believed to sustain the jurisdiction of this Court is Section 347 (a) of Title 28, U. S. Code Annotated. (Quoted in full in Appendix A of brief filed herewith.)

2. This petition was filed in this Court within the time required by Section 350, Title 28, U. S. Code Annotated. (Quoted in full in Appendix A of brief filed herewith.) The first decision of the Circuit Court of Appeals was made April 4, 1940. The decision of that Court on petition for rehearing was made May 21, 1940. The mandate of that Court has been stayed to August 1, 1940 to permit the filing of this petition. The time for filing this petition did not begin to run until May 22, 1940 (*U. S.* v. *Ellicott*, 223 U. S. 524), so the petition is seasonably filed.

3. The case involves the jurisdiction of the District Courts of the United States, under Sections 9 and 22 of the Act to Regulate Commerce (Sec. 9 and 22, Title 49, U. S. Code Annotated, to hear and determine a series of similar and properly joined causes of action against the Defendants severally, arising from the misdelivery of property transported in interstate commerce by carriers, in violation of the common law duties of such carriers defined by this Court in *Covington Stock Yards* v. *Keith*, 139 U. S. 128, without prior recourse to the Interstate Commerce Commission; together with other related questions arising under the federal law of carriers of property in interstate commerce.

4. The case believed to sustain the jurisdiction of this Court is:

Mitchell Coal and Coke Co. v. *Pennsylvania R. R.*, 230 U. S. 247 at 250 (and cases there cited).

("The order of dismissal was founded on the denial of jurisdiction, and this court has power to review that ruling.")

QUESTIONS PRESENTED.

The following questions are presented for the consideration of this Court:

1. Under Section 22 of the Commerce Act (Sec. 22, Title 49, U. S. C. A.) have the Federal or State Courts original jurisdiction of an action against a common carrier for damages, arising from a delivery of a consignee's property, at destination, to a third person not entitled to receive possession of such property as consignee's agent, before any tender of such property or opportunity to receive it, has been offered to consignee, and with full knowledge that such third person will never effect delivery to the owner, until some additional sum, not a transportation charge, is paid to such third person?

2. May a common carrier of property in interstate commerce by railroad, naming rates to a station in its published tariffs, lawfully refuse to effect a delivery to consignee at any point within the limits of that station, except to a point at which consignee can gain access to, or egress to a public street from, or possession of his property, only by paying an extra charge he had never contracted to pay, and a charge levied for a service consignee did not request or desire?

3. On motion to dismiss, may a Federal Circuit or District Court so far depart from the usual and accepted course of procedure on such motions, as to challenge and dispute, rather than accept the facts alleged in the complaint, substitute other facts, not alleged in the complaint, and sustain or deny the motion upon such substituted facts?

4. Has the Interstate Commerce Commission *any* jurisdiction over a cause of action, not grounded in some way upon some violation of some provision of the Interstate Commerce Act, by a carrier subject thereto?

5. Assuming that the complaint alleges a cause of action for overcharge, in excess of published tariff rates, in violation of Section 6(7) of the Interstate Commerce Act, is the jurisdiction of that question by the Commission exclusive, or merely concurrent at

the election of the Plaintiff, under Section 9 of the Commerce Act?

6. Are the common law duties of a common carrier by railroad any different with respect to livestock which it elects to deliver at a public stock yard, than they are with respect to livestock which it elects to deliver at the same station, at some point other than a public stock yard?

7. May a common carrier of property by railroad in interstate commerce, affect or change its common-law, common-carrier duties, and control the tribunal in which it may be sued, for misdelivery of property transported by it, by selecting, without consent of the consignee, a public stock yard located within the limits of the destination station, as the only point within which it will make a delivery of property transported, to the consignee entitled to receive it?

8. Can a finding of the Commerce Commission, in one proceeding that a certain carrier practice is not unreasonable in violation of Section 1 of the Commerce Act, constitute a bar to the recovery, by another shipper, in another proceeding, of overcharges in excess of tariff rates, collected by carriers in violation of Section 6(7) of the Commerce Act; that is: is the prohibition of Section 6(7) of the Commerce Act, against collecting more than the tariff charge, in any way dependent upon the reasonableness of the overcharge under Section 1 of the Act?

Special and Important Reasons for Review of the Decision of the Circuit Court on Writ of Certiorari.

The review sought is based upon the following reasons, each of which is later fully explained.

1. The decisions of this Court bearing upon the case at bar, are conflicting upon the question of whether the common law duties of a common carrier by railroad are changed, when livestock is delivered at a public stock yard, rather than at some other point at the same station, which conflict should be settled by this Court.

2. In a case presented solely on motion to dismiss, the Circuit Court, in disputing facts plainly alleged in the complaint, and in substituting *ex parte* facts therefor, decided a moot case and failed to decide the case presented; thereby so far departing from the accepted and usual course of judicial proceedings as to call for an exercise of the supervision of this Court.

3. The decision of the Circuit Court is probably in conflict

(a) with the decisions of this Court on questions of Federal Law.

(b) with the great weight of authority, on a point of general law; such weight of authority consisting of the decisions of this court, of the Federal Circuit and District Courts; of the State Courts, and of the Interstate Commerce Commission;

(c) with the decisions of the Circuit Court of Appeals for the Eighth Circuit on questions of Federal jurisdiction;

(d) with the decision of the Supreme Court of Illinois on an important question of local law.

1. The Conflict in the Decisions of This Court Upon the Question of the Common Law Duties of a Common Carrier, With Respect to the Delivery of Livestock Transported in Interstate Commerce.

The conflict in the decisions of this Court exist between the decisions of this Court in the following cases, in the following respects:

This Court has considered four cases involving deliveries of livestock at public stock yards. In the first of these, *Covington Stock Yards* v. *Keith*, 139 U. S. 128, as in the case at bar, the shipper had no voice in the selection of the public stock yards as the point of delivery, that selection being made *solely* by the *carrier*.

The remaining cases involve livestock deliveries at the public stock yards in Chicago, and in two of those cases the delivery at that point was directed, or acquiesced in by the *consignee or shipper*. (See *Atchison, Topeka & S. F. Ry.* v. *U. S.*, 295 U. S. 193 at 195.) (*Adams* v. *Mills*, 286 U. S. 397.)

In the *Covington* case (139 U. S. 128) this Court established the principle, without qualification, that a common carrier of livestock might select any point within the station limits, even a public stock yards, as the point for delivery of livestock shipments; that so long as no additional cost resulted to the shipper from that selection the shipper was without cause of complaint; but that a carrier refusing to deliver at any point *other than* a public stock yards breached his contractual and common law duties when such delivery imposed extra expense upon the shipper.

In *Adams* v. *Mills*, 286 U. S. 397, this Court applied the same principle to the Chicago Public Stock Yards and held that the so-called unloading charge, paid by the carriers

out of the transportation rate, to their agent (the Yards Company), constituted consideration for a far more extensive service than mere unloading. This Court held (at page 414) that the carrier's transportation charge (out of which the Yards Company was paid), covered *"all services performed in connection with the shipment up to and including the placing of the stock in the pens of the commission men,"* and paid for carrier services "other than the mere unloading of cars." This language carried the carrier's duty of delivery at a public stock yard, *far beyond the mere unloading pens.* Since this decision was made after the enactment of Section 15(5) of the Commerce Act, it would appear to hold that the carrier's duty to deliver, at public stock yards, extended beyond the mere unloading pens and that such duty had *not* been limited by the passage of Section 15, Paragraph 5 of the Act.

The case of *Union Stock Yards and Transit Co.* v. *U. S.*, ... U. S. .....; 84 L. ed. 188, recently decided by this Court, seems to affirm the finding in the *Adams* case. This Court there held that transportation of livestock to public stock yards ended "only after the unloading for *delivery or tender to consignee.*" The citation of the *Covington* case next following this language, connotes the thought that the tender of delivery named must be a *free* delivery, and must include free ingress to the point of tender, and free egress to a public street from the point of delivery, even though such tender was made in a public stock yard.

But intervening between the two decisions cited, this Court decided the case of *Atchison, Topeka and Santa Fe Ry.* v. *U. S.*, 295 U. S. 193. In that decision this Court used language appearing to be wholly inconsistent with the decisions in the *Covington, Adams* and *Union Stock Yards* cases.

The consignee there involved was a packing company. It had customarily taken possession of its shipments on the premises of the Stock Yards Company and driven them over a viaduct, provided by the Stock Yards Company, to their plant. This Court said, at page 201 (emphasis supplied):

> "So the long established and uniform practice to provide a route via the overhead runway to the Hygrade plant distinguishes the use of the Yards Company's properties for this service from mere egress such as *is included* in transportation of livestock *to destinations other than public yards.* Plainly there is an essential difference between the route from unloading pens to consignee's plant and a mere way out to the public highways."
>
> * * * * *
>
> "Usage and physical conditions combined definitely to end transportation, at least in respect of these shipments, with *unloading into suitable pens as is now required by Sec. 15(5).*"

By this language it appears that this Court was distinguishing between the duty of a carrier to deliver livestock at a public stock yard, and the duty of the same carrier in delivering livestock "to destinations other than public stock yards." And the last sentence above quoted seems to warrant the conclusion that the carrier's delivering responsibilities as to shipments to a public stock yards, particularly to Chicago, end with "unloading into suitable pens", whether the shipper has ingress to and egress from such pens, or not.

Thus, in the *Adams* case and the *Covington* case, and apparently in the *Stock Yards* case, this Court extends the liability of the carrier, delivering at a public stock yards, *far beyond* the unloading pens. While in the *Atchison* case it appears to terminate the liability of such carrier *at* the unloading pens.

That our interpretation of the *Atchison* decision is not without foundation may be evidenced by consider-

ing a recent interpretation of that very decision by the Interstate Commerce Commission. In *Swift and Company* v. *Alton Railroad Co., et al.*, 238 I. C. C. 179, (pages 190-196), the Interstate Commerce Commission devotes nearly six pages of its decision to an interpretation of this Court's decision in the *Atchison* case. With reference to the language of this Court last above quoted, the Commission said (emphasis supplied): "*the Court was contrasting the situation at public stock yards with the situation at livestock terminals other than public stock yards* * * *" (page 191). The conclusion of the Commission was that this Court decided, that the adoption of Section 15, paragraph 5 of the Act, by Congress, *changed the liability of a common carrier by railroad to deliver livestock when the point of delivery at destination was a public stock yard.*

As a matter of law, are the duties of a common carrier with reference to the delivery of livestock, any different as to livestock which carriers elect to deliver at a public stock yard than they are with reference to livestock consigned to, or delivered at, a destination other than a public stock yard? We respectfully submit that the conflict in the decisions above referred to, should be reconciled by this Court.

The importance of this conflict in the case at bar depends entirely upon the interpretation which this Court shall place upon the complaint herein. If this Court accepts the interpretation of the author of that complaint, and finds that no act of the Plaintiff was responsible for the use of public stock yards property; finds that such use was occasioned solely by the election of the Defendant carriers, then the case is upon all fours with the *Covington* case and the conflict above referred to is here moot, unless this Court believes that carriers

may, at their own free will, change their legal duties to a shipper by electing to use a public stock yard.

But if this Court sees no difference between the public stock yard and the railroad station *named after it;* if this Court assume that a bill of lading naming the station "Union Stock Yards, Illinois" is synonymous to, and names a destination co-extensive with, the public stock yards, in such event the conflict in the decisions of this Court become of major importance, and we earnestly request that the question above stated be answered by this Court. If the principle of the *Covington* case and *Adams* case are to be reversed at public stock yards, we think such reversal may properly come only from this Court. If the quoted statements from the *Atchison* case are to be reversed, or clarified, we earnestly submit that such clarification or reversal should come from this Court.

2. The Circuit Court, by Refusing, on Motion to Dismiss, to Accept the Allegations of the Complaint as Admitted and True; and by Substituting Ex Parte Facts for the Facts Alleged, Has So Far Departed From the Usual and Accepted Procedure As to Warrant the Exercise of This Court's Powers of Supervision.

The Circuit Court, on a motion to dismiss, has so far departed from the accepted and usual course of proceedings, as to challenge, rather than accept the facts alleged in the complaint, in the following respects:

(1) The Circuit Court finds, as a matter of fact, that a "tri-party" contractual "relationship" existed as to the shipments involved, between the Plaintiff, the carriers and the Yards Company. (R. 83, line 19; R. 84, line 11.) From this "tri-party relationship" the court constructs the administrative question of stock yards practices, upon which its decision hinges.

The complaint establishes that *no* contractual rela-

tionship of *any* kind existed between Plaintiff and the Yards Company (R. 37-38 and 12), and that such Company became involved in the transaction solely as agent of the carriers, under a sub-contract between carrier and Yards Company, under which the Yards Company was hired by the carrier, to complete the transportation contract between carrier and shipper. (R. 10, par. 14.)

In the argument contained in the supporting brief, specific allegations of the complaint are set forth, establishing the non-existence of any such "tri-party relationship". The Circuit Court must have gained this conception from prior decisions of this Court in cases involving the Chicago Yards where such a "tri-party relationship" *might* be assumed from the fact that the owner of the freight *directed* delivery of his property *at the public stock yards.* Here the owner of the property made *no* such selection but left the selection of the delivering point entirely to the carrier.* (R. 10, par. 14.) The hiring of the Stock Yards Company was the selection made by the carriers and the Plaintiff was not a party to that contract of hiring.

(2) The Circuit Court finds that Plaintiff's claim is for "overcharge", *i. e.*, collection of a sum greater than named in carrier's tariffs, for the service in question.

The complaint establishes that Plaintiff paid the *exact* charge named in the tariffs, to the Defendants. (R. 9, par. 12.) The payment made to the Yards Company, as ransom for the recovery of Plaintiff's property, after the carriers' wrongful delivery to it, was not made upon any transportation contract, and could not be an overcharge in violation of the Act, since no relation of shipper and carrier (or *no other* contractual relation) existed

* See footnote, p. 3, *supra.*

between Plaintiff and the public stock yards Company, at *any* time.

3. The Decision of the Circuit Court Is Probably in Conflict With the Decisions of This Court; of the Circuit Court of Appeals for the Eighth Circuit; of the Federal District Courts; of the Highest Courts of Several States, Including Illinois; and of the Interstate Commerce Commission, in Its Interpretation and Application of Sections 9, 12(1), 13(1), 15(1), 16(1) and 22 of Title 49, U. S. C. A.

The decisions of this Court, of the Federal District and Circuit Courts, of the State Courts, of the Federal Court for the Eighth Circuit, of the Supreme Court of Illinois, and of the Interstate Commerce Commission, with which the decision of the Circuit Court conflicts; and the particular respects wherein the decision of the Circuit Court is in conflict therewith, are as follows:

(1) With reference to the common law duty of a common carrier of livestock in interstate commerce, to effect a free delivery the Circuit Court has held:

(a) That the Federal District Courts are without original jurisdiction of a simple action for damages resulting from the carrier's wrongful delivery of livestock transported in interstate commerce (before any tender thereof had been made to consignee), to a person not entitled to receive them as Plaintiff's agent, contrary to the decision of this Court in *Galveston, Harrisburg, and San Antonio Ry.* v. *Wallace,* 223 U. S. 481, and *Atlantic Coast Line Railroad Co.* v. *Riverside Mills,* 219 U. S. 186;

(b) That where a common carrier by railroad, on its own motion, elects to tender delivery of livestock at a point selected by it, within the destination station limits (the selected point being a public stock yard, rather than some other point within the limits

of the same station), that the added costs resulting from such selection are for account of the shipper, contrary to the decision of this Court in *Covington Stock Yards* v. *Keith*, 139 U. S. 128, cited and followed in the recent decision of this Court in *Union Stock Yards & T. Co.* v. *U. S.*, ... U. S. .....; 84 L. ed. 188;

(c) That the selection by such a common carrier of a public stock yards, rather than some other point within the station limits of the same billed destination, deprives the Courts of the power to determine what the common law duties of such carrier are, with regard to delivery, and vests in the Commerce Commission exclusive jurisdiction of a matter which would *not* be within the jurisdiction of that body, *but for* such selection of such carrier, contrary to the decisions of this Court in *Covington Stock Yards* v. *Keith*, 139 U. S. 128; and *Galveston, Harrisburg and S. A. Ry.* v. *Wallace*, 223 U. S. 481.

(d) That when a shipment of livestock could have been delivered at destination at a point "other than a public stock yard" the carrier was not obligated to provide ingress to the point of tender, nor egress from the point of delivery to a public street, when *it elects*, without consent of the owner, to deliver through a public stock yard (rather than some other point within the station limits at the billed destination), whether the shipment was billed to that public stock yard, by the shipper or not, unless the Commission passed upon the question; contrary to the holding of this Court in *Atchison, Topeka & Santa Fe Ry.* v. *U. S.*, 295 U. S. 193.

(e) In effect, that the mere *election* by the carrier, to deliver property through a public stock yard, rather than at another point within the limits of the same station, changes the legal duties of the carriers, and incidentally the tribunal in which those duties may be enforced, contrary to the decisions of this Court in *Covington Stock Yards* v. *Keith*, 139 U. S. 182; and *Galveston, Harrisburg & S. A. R. Co.* v. *Wallace*, 223 U. S. 481; *Atchison, Topeka & S. F. Ry.* v. *U. S.*, 295 U. S. 193; and *Union Stock Yards & Transit Co.* v. *U. S.*, ... U. S. .....; 84 L. ed. 188.

(f) That decision of the Interstate Commerce Com-

mission involving the same subject matter,* (but not the same factual or contractual status) does not inure to the benefit of another shipper similarly situated, contrary to the holding of this Court in *Phillips* v. *Grand Trunk Ry.*, 225 U. S. 665, and *Lowden* v. *Simmons etc. Grain Co.*, 306 U. S. 516.

(2) With reference to the jurisdiction of the Courts and of the Commerce Commission, under Sections 9; 13(1); 15(1); 16(1) and 22 of the Commerce Act (Title 49, U. S. C. A.) the Circuit Court has interpreted and applied those statutory provisions in a way in conflict with the great weight of authority viz., the decisions of this Court, of the Circuit Courts of Appeals for the Eighth Circuit, of the Federal District Courts, of the highest courts of the States, including Illinois, and of the Interstate Commerce Commission, in one of two respects, depending upon the interpretation placed upon the complaint.

If the complaint alleges no violation of any provision of the Act by any carrier subject thereto, a condition precedent to any jurisdiction of the Commission which the Commerce Act makes necessary, is absent.

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* On petition for rehearing, Plaintiff pointed out to the Circuit Court that the Commerce Commission, since the Court's first decision, had decided *Swift and Company* v. *Alton R. R. Co. et al.*, 238 I. C. C. 179; that the Commission there found that consignee at Chicago, had the tariff option (Pg. 189) of directing delivery at this destination, (a) at the public stock yards; (b) on carrier team tracks, or (c) on industry tracks (Pg. 183, 189). It found in that case that the shipper *elected* to take delivery at the public stock yards (Pg. 189). As to such shipments it held that transportation ended at the unloading pens. It did not challenge, but adopted the ruling of this Court in *Atchison, Topeka and S. F. Ry.* v. *U. S.*, 295 U. S. 193 as to shipments delivered at "other than public stock yards".

In its petition for rehearing Plaintiff pointed out to the Circuit Court that it had *not* elected to take delivery of its shipments at the public stock yards, (as the Commission found Swift had elected), but had agreed to accept delivery there, or "at such other point" (R. 11) at which carriers tendered them, but had specified that *if* carriers elected to use the public stock yards it must be at their, the carriers' expense (R. 18, 36).

It was pointed out that Plaintiff's transportation contracts would have permitted carriers to tender delivery at team tracks, at industry tracks, or elsewhere at this station, at their election, and that the decision of the Commission as to carriers' liability when shipments were *not* billed to the public stock yards, inured to Plaintiff's benefit. Plaintiff's motion to remand to the District Court for trial in the light of the Commission's decision was denied.

On the other hand, if a violation of Section 6(7) of the Act is alleged in the complaint (viz., "overcharge") the jurisdiction of the Courts is concurrent, and, under Section 9 of the Commerce Act, Plaintiff's selection of the Courts effectively bars any jurisdiction of the Commission. Nor does the administrative question recited by the Circuit Court (the history of the yards, etc.) have *any* bearing upon the sole violation of the Act found to be involved; *i. e.*, the history of the yardage charges throws no light upon (a) what the tariff rate was, or (b) what amount over the tariff rate the Plaintiff paid. Only these questions are involved in determining an overcharge, violating Section 6(7) of the Commerce Act.

The above principles are established by the great weight of authority. Sections 9, 13(1); 15(1); 16(1) and 22 of the Commerce Act have been so interpreted and applied in the following decisions:

(1) Of the United States Supreme Court in:

Galveston, Harrisburg and S. A. Ry. Co. v. *Wallace,* 223 U. S. 481.

United States v. *Pennsylvania R. Co.,* 242 U. S. 208.

Pennsylvania R. Co. v. *Puritan Coal Mining Co.,* 237 U. S. 121.

Great Northern Ry. v. *Merchants Elevator Co.,* 259 U. S. 285.

Eastern Railway Company of New Mexico v. *Littlefield,* 237 U. S. 140.

Illinois Central R. Co. v. *Mulberry Hill Coal Co.,* 238 U. S. 275.

Pennsylvania R. Co. v. *Sonman Shaft Coal Co.,* 242 U. S. 120.

Pennsylvania R. Co. v. *Clark Coal Mining Co.,* 238 U. S. 456.

(2) Of the United States Circuit Courts of Appeal for the Eighth Circuit in:

National Elevator Co. v. *Chicago, M. & St. P. Ry. Co.*, 246 Fed. 588.

Empire Refineries v. *Guaranty Trust Co.*, 271 Fed. 668.

(3) Of the United States District Courts in:

(New York) *J. C. Francesconi & Co.* v. *Baltimore & O. R. Co.*, 274 Fed. 687 at 690, 691.

(Penn.) *Gimbel Bros. Inc.* v. *Barrett*, 215 Fed. 1004, at 1006.

(Iowa) *Storm Lake Tub and Tank Factory* v. *Minneapolis & St. L. R. Co.*, 209 Fed. 895 at 901-3.

Adams v. *Chicago Great Western R. Co.*, 210 Fed. 362 at 364, 365.

Tullar & Tullar v. *Illinois Cent. R. Co.*, 213 Fed. 280.

(4) Of the Supreme Court of various States in:

(Alabama) *Ex Parte L. & N. R. Co.*, 79 South. 139 at 140.

W. L. Shepherd Lumber Co. v. *Atlantic Coast Line R. Co.*, 112 South. 323 at 325.

(Arkansas) *Kansas City Southern Ry. Co.* v. *Tonn*, 143 S. W. 577 at 579-581.

(Illinois) *Gustafson* v. *Michigan Cent. R. R. Co.*, 296 Ill. 41 at 44-45.

(Louisiana) *Pine Tree Lumber Co.* v. *Chicago, R. I. & P. Ry. Co.*, 49 South. 202 at 204.

(Texas) *St. Louis, S. F. & T. Ry. Co.* v. *Roff Oil etc. Co.*, 128 S. W. 1194 at 1195.

(Washington) *Southern Pac. Co.* v. *Fry & Bruhn, Inc.*, 143 Pac. 163 at 166.

(5) Of the Interstate Commerce Commission in:

In re Transportation and Refrigeration of Fruit, 10 I. C. C. 360 (decided in 1904, and cited with approval by this Court in *U. S.* v. *Pennsylvania R. Co.*, 242 U. S. 208).

Blume v. *Wells Fargo*, 15 I. C. C. 53 at 54-55.

Western Stock Yards Co. v. *New York Cent. R. Co.*, 87 I. C. C. 4 at 6.

Briggs, et al. v. *Director General*, 112 I. C. C. 313 at 315.

American Fuel Co. etc. v. *Atchison, T. & S. F. Ry. Co.*, 123 I. C. C. 101 at 113.

(and fifteen other decisions cited in Appendix B to the brief filed in support hereof).

Conclusion.

In the interest of brevity, and in compliance with the Rules of this Court, petitioner does not here set forth in detail all the points that will be urged at the argument of this case on the merits, should the writ prayed for be granted, nor all of its contentions in support of such points; but in compliance with Rule 38, Par. 2 of the Rules of this Court, requiring that all issues upon which decision is requested be stated herein, petitioner here refers to and incorporates into this petition by reference, all of the matters presented in its "Statement of Points" on appeal to the Circuit Court (R. 59, 60) with the same force and effect as if herein set forth in full.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the decision and decree of the United States District Court of the Northern District of Illinois, Eastern Division, and the decision and order of the United States Circuit Court of Appeals for the Seventh Circuit, be reversed by this Honorable Court, and that your petitioner have such other and further relief in the premises as to this Honorable Court shall seem just and equitable.

Most respectfully submitted,

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